RENGASAMY PILLAI v. COMPTROLLER OF INCOME TAX

[P.C. (Lord Morris of Borth-y-Gest, Lord Pearson & Lord Diplock) March 2, 1970]

[Privy Council Appeal No. 5 of 1969]

Bankruptcy — Bankruptcy notice not complying with s. 7(1), Courts of Judicature Act, 1964 — Formal defect — Validated by s. 131, Bankruptcy Ordinance, 1959.

Bankruptcy — Payment of judgment debt in accordance with judgment — Discharge of judgment debt in part.

Practice and Procedure — Privy Council — Fresh point of law taken on appeal — Not the practice of Privy Council to allow, save in very exceptional cases.

Legislation — Generalia specialabus non derogant — Application.

This was an appeal from the Federal Court of Malaysia, arising from a bankruptcy notice issued on the appellant claiming payment of the sum of $54,826.68 stated to be due on a final judgment of the High Court for the sum of $309,660.53. The appellant had applied to set aside the bankruptcy notice contending that it was invalid on two grounds: (1) the sum specified in the notice as the amount due exceeded the amount actually due; and (2) the notice was not issued and expressed to be issued by the Chief Justice of the High Court in the name of the Yang di-Pertuan Agong as required by section 7(1) of the Courts of Judicature Act, 1964. The application was dismissed in the High Court and in the Federal Court ([1968] 2 M.L.J. 42). On appeal to the Privy Council the appellant abandoned the first ground advanced in the High Court and on appeal to the Federal Court but sought to argue that the bankruptcy notice was not a notice within the meaning of section 3(1)(i) of the Bankruptcy Ordinance, 1959, because it did not claim payment of the judgment debt in accordance with the terms of the judgment.

Held, dismissing the appeal: (1) the bankruptcy notice in this case was defective as it did not comply with section 7(1) of the Courts of Judicature Act, 1964, but as this was a formal defect which could not reasonably mislead a debtor upon whom it was served, it was validated by section 131 of the Bankruptcy Ordinance, 1959;

(2) it is not the practice of the Privy Council, save in very exceptional cases, to allow a fresh point of law to be argued without the benefit of the judgments in the court below, even where all the facts which may be relevant to the new point are before the Privy Council and beyond dispute.

[*Editorial Note:* The Bankruptcy Ordinance, 1959 has since been repealed and replaced by the Bankruptcy Act, 1967.]

Cases referred to:-

(1) *United Marketing Co.* v. *Kara* [1963] 1 W.L.R. 523.

(2) *In re A Debtor* [1938] 1 Ch. 694.

(3) *Seward* v. *Vera Cruz* L.P. 10 App. Cas. 59, 68.

(4) *Bishop of Gloucester* v. *Cunnington* [1943] K.B. 101.

(5) *In re Pritchard* [1963] 1 Ch. 502.

(6) *In re A Debtor Ex parte The Debtor* v. *Bowmaker Ltd.* [1951] 1 Ch. 313.

PRIVY COUNCIL appeal from the Federal Court of Malaysia heard on January 19 and 20, 1970.

L. J. Blom-Cooper for the appellant.

Stewart Bates for the respondent.

Lord Diplock (delivering the judgment of the Board): This is an appeal from the Federal Court of Malaysia in a case about the validity of a bankruptcy notice served on the appellant taxpayer on 17th August 1967, which claimed payment of the sum of $54,826.68 stated to be due on a final judgment of the High Court of Malaysia obtained for a total amount of $309,660.53.

The bankruptcy notice was in the form prescribed by Rules in force under the Bankruptcy Ordinance 1959, which was made by the Legislature of the Federation of Malaya and continued in force after the constitution of the Federation of Malaysia by section 73 of the Malaysia Act 1963. The notice was expressed to be issued by the High Court in Malaya at Penang whose seal it bore and it was signed by the registrar of that court.

The relevant facts preceding the issue of the notice so far as they are disclosed by the evidence may be stated briefly. The appellant had been assessed to income tax and statutory penalties in the sum of $309,660.53. This assessment was made by the Comptroller of Income Tax who is the respondent to this appeal. He obtained final judgment for this sum in the High Court in Malaya at Penang on 3rd July 1964. This he was entitled to do notwithstanding that an appeal by the taxpayer against the assessment was pending before the board of review constituted under the Income Tax Act. After the final judgment for $309,660.53 but before the issue of the bankruptcy notice, the assessment on which the judgment was based was reduced by the amounts of $191,839.20 in respect of tax and $9,591.90 in respect of the statutory penalties attributable thereto. It is not wholly clear on the evidence whether this reduction was made by an order of the board of review or by agreement between the comptroller and the taxpayer. From what their Lordships have been told from the Bar, however, it would appear to be the former, although the order may have been made by consent. After the judgment but before the issue of the bankruptcy notice the taxpayer also made payments totalling $53,402.75 in part satisfaction of the judgment.

The sum of $54,826.68 specified in the bankruptcy notice as the amount due on the judgment represents the balance then outstanding of the original judgment for $309,660.53 after giving credit for the payments made by the taxpayer and the amount by which the assessment and statutory penalties which formed the basis of the original judgment had been reduced as a result of the proceedings by way of appeal before the board of review. The figures showing how this balance was arrived at were set out in the notice.

The taxpayer applied in the High Court in Malaya at Penang to set aside the bankruptcy notice contending that it was invalid on two grounds, *viz.*:

(1) that the sum specified in the notice as the amount due exceeded the amount actually due, and

(2) that the notice was not issued and expressed to be issued by the Chief Justice of the High Court in the name of the Yang di-Pertuan Agong as required by section 7(1) of the Courts of Judicature Act 1964.

The first ground, as it was advanced both in the High Court and on appeal in the Federal Court, was based upon proviso (ii) to section 3(2) of the Bankruptcy Ordinance 1959 and the Rules made thereunder which entitles a judgment debtor to have a bankruptcy notice set aside if it claims more than the amount actually

due on the judgment and he gives due notice to the creditor that he disputes the validity of the notice on this ground. This ground raised questions of fact and arithmetic which were decided by both courts below in favour of the comptroller. It was abandoned at the hearing before their Lordships, and it is now conceded that the sum claimed was actually due. Before their Lordships the appellant sought to rely upon a different ground of invalidity which was never argued in either of the courts below and is not even adverted to in the appellant's case. Furthermore, it is a technical point devoid of any substantial merit.

What he wished to argue was that the notice was not a bankruptcy notice within the meaning of section 3(1)(i) of the Bankruptcy Ordinance 1959 because it did not claim payment of the judgment debt "in accordance with the terms of the judgment" as required by that paragraph. The sum claimed by the notice was admittedly due but it is now sought to be contended that it was due only under an agreement between the comptroller and the taxpayer or under an order of the board of review which superceded the judgment and accordingly was not due "in accordance with the terms of the judgment".

As has been repeatedly stated it is not the practice of their Lordships, save in very exceptional cases, to allow a fresh point of law to be argued without the benefit of the judgments in the court below, even where all the facts which may be relevant to the new point are before their Lordships and beyond dispute. (See *United Marketing Co.* v. *Kara*[1] and the cases there cited.) In the present appeal the full circumstances relating to the proceedings before the board of review which resulted in the assessments being reduced, and which must constitute the factual foundation for this fresh point of law are not in evidence. Even if their Lordships thought that the point was right in law they would not be disposed to allow the appeal upon this ground.

Their Lordships did, however, permit the argument to be developed in order to decide whether this was one of the very exceptional cases where new matters might be considered. Without expressing any final view upon the new point it may be appropriate, in fairness to the appellant's counsel in the courts below who did not raise the point there, to say that as at present advised it is in their view bad in law. A judgment debt may, with the consent of the judgment creditor, be discharged in part, and where this has been done a bankruptcy notice may be issued for the balance remaining undischarged. This is what appears to have been done in the instant case.

The second ground on which this appeal is based was relied upon in the courts below. It is even more technical in character than the first. It is contended that the bankruptcy notice failed to comply with the requirements of section 7(1) of the Courts of Judicature Act 1964 and that the consequence of such compliance is that the notice was a nullity.

Section 7 of the Courts of Judicature Act 1964 is in the following terms:

"7. (1) All summonses, warrants, orders, rules, notices and mandatory processes whatsoever, whether civil or criminal, shall be issued and shall be expressed to be issued by the Chief Justice of the High Court issuing the same in the name of the Yang di-Pertuan Agong and shall be signed by a Registrar of such Court; and every such summons, warrant, order, rule, notice and mandatory process shall be sealed with the seal of the Court issuing or making the same.

(2) All summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal, issued or made by or by the authority of any Court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malaysia."

Both courts below were of opinion that sub-section (1) had no application to a bankruptcy notice, the High Court upon the ground that it was not a "notice" within the meaning of the sub-section, the Federal Court upon the ground that the maxim *generalia specialibus non derogant* applied so as to exclude proceedings in bankruptcy from the ambit of the sub-section.

Counsel for the respondent has not sought to support the reasoning of the High Court. The issue of a bankruptcy notice by the court is a proceeding in bankruptcy and is so described in the Rules. (See *In re a Debtor*[2]). In their Lordships' view it is a "notice" within the sub-section if upon its true construction the sub-section applies to proceedings in bankruptcy at all.

Their Lordships have felt more difficulty about the grounds upon which the Federal Court disposed of this point. It was dealt with briefly in their judgment. All that was said was:

"Bankruptcy is a special matter and it is dealt with by special law. Because *generalia specialibus non derogant*, I hold that the bankruptcy notice, to be valid, need only comply with section 3(2) of the Bankruptcy Ordinance, 1959 (now section 3(2) of the new Bankruptcy Act, 1967). It need not be issued and expressed to be issued by the Chief Justice in the name of the Yang di-Pertuan Agong. This bankruptcy notice was in the prescribed form and is therefore valid."

The rationale which underlies the Latin maxim is that where the legislature has already dealt with a special subject-matter by legislation directed to and confined to that subject-matter, it is not to be inferred that general words used in subsequent legislation which does not deal expressly with that subject-matter, although they are wide enough in their ordinary meaning to extend to it, are to be construed as repealing, altering or derogating from the previous legislation dealing with the special subject-matter unless there is a clear indication of the legislature's intention that the general words should have that effect. (*Seward* v. *Vera Cruz*[3], *Bishop of Gloucester* v. *Cunnington*[4]).

It is thus necessary to consider the legislative history of bankruptcy law in Malaysia and its predecessor States. Following the English model the law of bankruptcy except for an interval of eleven years between 1948 and 1959 had been treated as a separate and self-contained subject-matter of legislation. The special legislation relating to bankruptcy which was in force at the time of the issue of the bankruptcy notice, *viz.*, The Bankruptcy Ordinance 1959, itself contained express provisions conferring jurisdiction in bankruptcy upon "the High Court" but the High Court there referred to was the High Court which had formed part of the Supreme Court of Malaya. This Ordinance repealed the separate bankruptcy legislation of the Federated Malay States, the Straits Settlements and Johore enacted before the Federation of Malaya Agree-

ment 1948, and remaining in effect until 1959 in modified form under transitional provisions. The Federation of Malaya Agreement 1948, had established a new Supreme Court, comprising a new Court of Appeal and a new High Court, in substitution for the corresponding courts of the constituent states of the new Federation of Malaya. The jurisdiction of the new Supreme Court was conferred upon it by the Courts Ordinance 1948. This Ordinance dealt expressly with jurisdiction "under any written law for the time being in force relating to bankruptcy" and conferred this upon the newly established High Court by section 47 and Schedule II Part A, Paragraph 3. The existing Bankruptcy Rules in the Federated Malay States were preserved and made applicable to proceedings in the new High Court by section 110(3) of the Ordinance.

Between the passing of the Courts Ordinance 1948 and the passing of the Bankruptcy Ordinance 1959, the jurisdiction of the High Court in bankruptcy was thus derived not solely from legislation dealing with the special subject-matter of bankruptcy but also in part from legislation dealing generally with courts of justice, though the procedure of the High Court in bankruptcy continued to be regulated by rules which had been made under legislation confined to the subject-matter of bankruptcy. There was however no conflict between those rules and the provisions of the Courts Ordinance 1948 as respects the form of any notice issued by the High Court in bankruptcy proceedings.

With the passing of the Bankruptcy Ordinance 1959 however, the legislature reverted to its previous practice of dealing with bankruptcy as a separate and self-contained subject-matter of legislation and from then until the establishment of the Federation of Malaysia in 1963, the jurisdiction of the High Court in bankruptcy was derived from that Ordinance and its procedure regulated by rules made or continued in effect under that Ordinance. Section 3(2) of the Bankruptcy Ordinance 1959 provided that "A bankruptcy notice under this Ordinance shall be in the prescribed form." The form prescribed under the Rules bore the title of the High Court by which it was issued and was expressed to be issued "by the court". It was signed by the Registrar and sealed with the seal of the court.

In 1963 the Federation of Malaya came to an end and the Federation of Malaysia was established. The Supreme Court of Malaya thereupon ceased to exist and the judicial power of the new Federation was by Article 121 of the Constitution vested in three new High Courts, the Federal Court and such inferior courts as may be provided by federal law. The Constitution came into effect on Malaysia Day, the 16th September 1963, as did (retrospectively) the Malaysia Act 1963. By section 89 of that Act the judges of the former Supreme Courts of the constituent States of the new Federation became judges of the High Courts of the Federation of Malaysia and by section 87 until other provision was made by federal law the jurisdiction, procedure and practice of the High Courts was to be the same as that previously exercised and followed in the Supreme Courts of the constituent States. The Bankruptcy Ordinance 1959 was kept in force in the new Federation by section 73.

The "other provision" as to the jurisdiction, procedure and practice of the High Courts which was contemplated by section 87 of the Malaysia Act 1963, was made by the Courts of Judicature Act 1964. Like its precedessor in the Federation of Malaya, the Courts Ordinance 1948, it dealt comprehensively with the jurisdiction to be exercised by the High Courts and expressly conferred upon them by section 24(c) "jurisdiction under any written law relating to bankruptcy". Section 4 of the Act expressly provided that in the event of any inconsistency or conflict between the provisions of the Act and any other written law in any part of Malaysia other than the Constitution the provisions of the Act should prevail.

The provisions of section 7 of the Act, which have already been quoted, as respects the issue and form of "all summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal", do conflict with the provisions as to the form of bankruptcy notices contained in the Bankruptcy Rules 1921, which were in force under the Bankruptcy Ordinance 1959, in that a notice in the prescribed form is expressed to be issued by the High Court and not by the Chief Justice in the name of the Yang di-Pertuan Agong. The Rules contain no express provision as to the person by whom the notice is to be issued but the prescribed form of request for issue of the notice asks for it to be issued "by this court".

In their Lordships' view it is not possible in the context of the Courts of Judicature Act 1964, to construe the general words of section 7 so as to exclude documents issued by a High Court in the exercise of any jurisdiction which is expressly conferred upon it by Chapter II of the same Act. Section 24(c) with its express reference to "jurisdiction under any written law relating to bankruptcy" is in their Lordships' view a clear indication that the legislature intended the subject-matter of the Courts of Judicature Act 1964 to include *inter alia* the special jurisdiction of the High Court in bankruptcy. *Prima facie*, therefore, the rule of construction expressed in the maxim *generalia specialibus non derogant* is not applicable so as to enable one to construe general words in the Act which are apt in their ordinary meaning to relate to the process of a High Court in the exercise of its bankruptcy jurisdiction as intended to exclude such process. Furthermore, the content of section 7 itself supports the view that the general words describing the class of documents to which sub-section (1) relates must have been intended to include documents issued in the exercise of bankruptcy jurisdiction. The same words are repeated in sub-section (2), which deals with the force and effect of documents issued by a court, and must bear the same meaning as in sub-section (1). If documents issued in the exercise of the bankruptcy jurisdiction of a High Court were excluded they would be deprived of force and effect in those parts of Malaysia which were outside the geographical limits of the jurisdiction conferred upon the particular High Court which issued them by section 23 of the Act.

Accordingly in their Lordships' view section 7(1) of the Courts of Judicature Act 1964, did apply to the bankruptcy notice issued on 17th August 1967. But the question still remains as to what are the legal consequences of its non-compliance with the terms of that section. Section 131 of the Bankruptcy Ordinance 1959, which is in the same terms as section 147(1) of the English Bankruptcy Act 1914, provides:

"131. No proceeding in bankruptcy shall be invalidated by any formal defect or by an irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court."

The validity of the notice thus depends upon whether or not its non-compliance with the requirements of section 7(1) of the Courts of Judicature Act 1964, is a "formal defect or... irregularity" within the meaning of section 131 of the Bankruptcy Ordinance 1959.

Section 7(1) of the Act of 1964 deals both with the issue of a bankruptcy notice and with its form. As respects issue, although in the first part of the sub-section it is provided that process shall be "issued by the Chief Justice of the High Court issuing the same", the latter part of the sub-section refers not to the Chief Justice but to "the court issuing... the same", while in subsection (2) the process is described as being "issued or made by or with the authority of any court". The section thus treats issue by the Chief Justice of the High Court and issue by the High Court itself as meaning the same thing.

Clearly it was not contemplated that the Chief Justice himself should perform in person any physical act in relation to the issue of individual documents forming part of the process of the court in civil proceedings. This is a function which *ex necessitate* he must delegate to the proper officer of the court. The requirements of the sub-section as to the steps to be taken when the documents are issued, *viz.* that they shall be signed by the Registrar and sealed with the seal of the court, sufficiently indicate the proper officer by whom the delegated power is to be exercised. While there is no specific evidence in the present case that the Chief Justice of the High Court in Malaya did delegate his power of issuing bankruptcy notices to the Registrar, the maxim *omnia praesumuntur rite esse acta* applies in the absence of any evidence to the contrary and delegation of authority to the court officials who actually issued the notice is to be presumed. So far as the issue of the notice is concerned the appellant has failed to establish any non-compliance with the subsection.

As respects form, the subsection requires that the notice, in addition to being signed by the Registrar and sealed with the seal of the court "shall be expressed to be issued by the Chief Justice of the High Court issuing the same in the name of the Yang di-Pertuan Agong". It was only in this last respect that the bankruptcy notice which is the subject of the present appeal was defective. It was expressed to be issued "by the Court" issuing it, *viz* the High Court in Malaya and did not mention the Chief Justice of that court or the Yang di-Pertuan Agong.

Counsel for the appellant rightly concedes that the omission of any reference to the Chief Justice or to the Yang di-Pertuan Agong not only did not in fact mislead the appellant but also could not possibly mislead anyone. Nevertheless, he contends that this was not "a formal defect or irregularity" within the meaning of section 131 of the Bankruptcy Ordinance 1959, and that the notice was a nullity. For this proposition he relies upon the authority of *In re Pritchard*.[5]

In re Pritchard was a decision of the Court of Appeal of England upon the construction of a Rule of the Supreme Court in quite different terms from those of section 131 of the Bankruptcy Ordinance 1959. It is unnecessary for their Lordships to express any view as to the correctness of this decision. The rule to which it related has since been amended. Suffice it to say that their Lordships find it of no assistance in construing the section which they have to consider in the present appeal.

But there is relevant authority upon the construction of the identical words in section 147(1) of the English Bankruptcy Act 1914. It is implicit in the section that proceedings in bankruptcy may be so defective as to render them a nullity notwithstanding that no substantial and irremedial injustice has in fact been caused by the defect. The section draws a distinction between such a defect and a "formal defect or irregularity". It is only the latter which are validated by the section, provided that no substantial and irremedial injustice has been caused.

What then is "a formal defect or irregularity" within the meaning of the section? This was discussed in relation to a bankruptcy notice in *In re a Debtor Ex parte The Debtor* v. *Bowmaker Ltd.*[6] in which the earlier authorities were considered. The test there laid down was whether the defect in the notice was of such a kind as could reasonably mislead a debtor upon whom it was served. If it was, the notice was not validated by the section notwithstanding that the particular debtor upon whom it was served was not in fact misled. If on the other hand it could not reasonably mislead the debtor it was a formal defect and validated by the section. Their Lordships are here only concerned with the application of the section to a bankruptcy notice. They are not concerned with whether the same test is appropriate to determine the validity of subsequent steps in bankruptcy proceedings. In their view any failure to comply with the statutory provisions as to the form of a bankruptcy notice of a kind which could not reasonably mislead a debtor upon whom it is served is a "formal defect" and validated by the section.

The defect in the bankruptcy notice served upon the appellant was of this kind as has been freely conceded. It was accordingly validated by section 131 of the Bankruptcy Ordinance 1959.

For these reasons their Lordships will report to the Head of Malaysia their opinion that the appeal should be dismissed and that the appellant should pay the costs of the appeal.

Appeal dismissed.

Solicitors: *T. L. Wilson & Co.; Stephenson Harwood & Tatham.*